INTERIOR BOARD OF INDIAN APPEALS

Mildred Hartman v. Anadarko Area Director, Bureau of Indian Affairs

23 IBIA 122 (12/18/1992)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

MILDRED HARTMAN
v.
ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-163-A Decided December 18, 1992

Appeal from a decision denying an application for assistance under the Bureau of Indian Affairs' Housing Improvement Program.

Affirmed.

1. Bureau of Indian Affairs: Generally--Contracts: Performance or Default: Impossibility of Performance--Indians: Housing: Housing Improvement Program

   Although the Bureau of Indian Affairs normally would be bound by the terms of a Housing Improvement Program grant agreement it had signed, it may be excused from performance in a case where performance is impossible.

2. Bureau of Indian Affairs: Administrative Appeals: Generally

   When, in the course of reviewing a matter under appeal, a Bureau of Indian Affairs official becomes aware that an error has been made by a subordinate Bureau official, and the error is still capable of correction, the deciding official has the authority and the responsibility to correct the error, even though the particular matter was not raised as an issue by the appellant.

APPEARANCES: Appellant, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Mildred Hartman seeks review of a May 4, 1992, decision of the Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), denying her application for assistance under BIA's Housing Improvement Program (HIP). For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant is an enrolled member of the Iowa Tribe of Kansas and Nebraska. On August 30, 1989, she submitted an application under HIP, indicating that she needed financial assistance in order to make needed repairs and renovations to a house she owns with her husband. The house

is located on an 80-acre farm near Hiawatha, Kansas. Appellant's husband is a farmer, and appellant operates a catering business on a part-time basis.

BIA sought additional information from her in October 1989 and, in January 1990, informed her that her application was complete and would be evaluated during the next evaluation and ranking period. Appellant's application was evaluated in April 1990 and received a rating of 30 points. 1/ In early 1991, BIA again reviewed her application. In a March 6, 1991, letter to the Horton Agency Superintendent, the Area Housing officer stated:

> The application documents provided indicate low income; however, site indicators belie the documentation. The indicators are:
>
> An 80-acre working farm with necessary equipment
>
> A large, modern house moderately furnished
>
> An occupied mobile home on the site
>
> A diner and catering service with no income information supplied
>
> The recently defaulted BIA loan on the Nokonis Club does not reveal a loss [2/]
>
> If this applicant is truly eligible, she should be served. The indicators cited above raise questions of eligibility. We would like to request the agency to do a social summary to determine this applicant's true monetary condition. The eligibility of this applicant will hinge on the findings of the social summary. [3/]

On March 15, 1991, the Superintendent wrote to appellant, requesting further specified information concerning her financial condition. Appellant had evidently submitted the required information by July 24, 1991. On that date, a document entitled "Indian Home Improvement Agreement and Acceptance

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1/ The rating form does not indicate the source of the criteria used. However, the criteria are the same as the "selection criteria" which appear in new HIP regulations published in the Federal Register on Jan. 27, 1992, 57 FR 3102. The new regulations indicate that the selection criteria are to be used to rank those applicants who have been determined to be eligible for the program. See 25 CFR 256.7.

2/ Apparently, appellant had received a business loan from BIA and defaulted on it.

3/ The question about appellant's eligibility was evidently based on the requirement in 25 CFR 256.5(a)(3) (1991) that "[t]he economic resources of the applicant [be] inadequate or factors exist which make the applicant unable to secure housing from other sources."

of Grant" was signed by appellant, the Superintendent, and a representative of the Kansas State Bank of Horton, depository for the grant funds.

BIA then sought bids for the work to be done on appellant's house. At the first invitation, no bids were received. At the second invitation, one bid was received by the November 22, 1991, deadline. That bid exceeded the $20,000 limitation on repair work set out in 25 CFR 256.4(b)(3) (1991) and in appellant's grant agreement. A second bid was received late and returned to the bidder unopened.

On December 17, 1991, the Area Housing Officer wrote to appellant, stating:

> You documented eligibility for housing rehabilitation assistance through the Bureau's Housing Improvement Program. Your house was reviewed and specifications written for the rehabilitation needed. It was advertised for bids and no acceptable bids were received.
>
> In coordination with you, your home improvement project specifications were rewritten in an effort to get the costs within the program guidelines. It was readvertised. The acceptable bid received was too high.
>
> Now our only option is to change your housing designation from rehabilitation to new housing. [4/] We can tear down the old house and build you a new three (3) bedroom unit.
>
> Do you want to pursue this option?
>
> [ ] YES [ ] NO
>
> Please notify this office of your decision.

By letter of December 31, 1991, appellant appealed the Housing Officer's letter to the Area Director and requested that a hearing be held at the Horton Agency. 5/

On May 4, 1992, the Area Director issued the decision on appeal here. He stated:

4/ 25 CFR 256.4 (1991) provided for four categories of assistance: (a) repairs to housing that will remain non-standard, (b) repairs to housing that will become standard, (c) down payments, and (d) new housing.

Appellant applied for assistance under category (b).

5/ 25 CFR 256.7(b) (1991) provided that denials of HIP applications by BIA officials could be appealed pursuant to 25 CFR Part 2. The regulations did not specifically provide a right to a hearing.

> Leon Campbell, your Tribal Chairman, requested that I personally review your application and case file for housing assistance through the Bureau's Housing Improvement Program (HIP).
>
> As you know the HIP is a safety net program. A safety net program is designed to help those people who are unable to get help from any other source including self help. These people are normally described as the poorest of the poor.
>
> A review of your case file reveals you have an 80 acre farm, a very nice house that needs some repair and other assets normally not available to the poorest of the poor. The case file shows that your income has temporarily dipped to a low level compared to your normal lifestyle as evidenced by your other assets. There may be a minimal need and desire for repair work on your home, but the assets in hand indicate that you do not fit the intended program profile of the poorest of the poor. Therefore, I am denying your application for assistance through the Home Improvement Program.
>
> I might add that the Iowa Tribe of Kansas and its officials have argued extensively on your behalf. However the documents presented by you and our own inquiries substantiate my decision that you and your home do not meet the intent of which this program was developed.

(Area Director's May 4, 1992, decision at 1).

Appellant's notice of appeal from this decision was received by the Board on May 18, 1992. Only appellant filed a brief.

Discussion and Conclusions

In her appeal to the Board, appellant contends:

> It appears that personalities have interfered in the selection and determination process in this case. I fully qualified for the program and it would appear that through no fault of my mine the project would have been completed except for the mail services. [6/] * * * For the Area Director now to consider that I am not eligible based on criteria without showing any change of circumstances is improper and inappropriate. There is nothing in his determination which is different from the same facts under which I qualified for the home improvement program.

6/ Appellant submits an affidavit from the bidder whose bid was rejected as untimely. The bidder states that he mailed his bid on Nov. 16, 1991, and that he believes "the error in receipt and tendering to the bid committee rests in the mail room at Anadarko, Oklahoma."

> Nothing additional was considered nor was any additional information considered from the time of qualification to the time of rejection. Therefore, I believe that the denial of the benefits has been improper and unjust.

(Appellant's Opening Brief at 3).

[1] Appellant argues, in essence, that, once BIA had approved her for participation in the HIP program, it was not entitled to change its mind absent same change in her circumstances. Although she does not cite it, appellant may have intended to rely, in part at least, on her July 24, 1991, agreement with BIA. Normally, BIA would be bound by the terns of an agreement it has signed, when the agreement is in accord with governing regulations. See Abbott v. Billings Area Director, 20 IBIA 268 (1991).

Here, however, it is possible that BIA was excused from performance of its contract by its inability, after two tries, to obtain a bid for $20,000 or less. The agreement states that "the Superintendent has determined that [appellant] is eligible to receive a grant in an amount not to exceed $20,000.00 for the purpose of making the following described improvements to said residence, to wit: To bring the house to standard condition as described in 25 CFR 256.2 [(1991)] and 256.4(b) [(1991)]."

25 CFR 256.4 (1991) provided:

> Program categories.
>
> The Housing Improvement Program will provide assistance in the following categories:
>
> * * * * * *
>
> (b) Repairs to housing that will become standard. Under this category:
>
> (1) Financial assistance will be granted to finance repairs, renovation and/or enlargement of existing structurally sound but deteriorated dwellings which can economically be placed in a standard condition.
>
> (2) Upon completion of work, the dwelling should at least meet the decent, safe and sanitary standards of standard housing as defined in § 256.2(i) [(1991)]. [7/]
>
> (3) The total expenditure of the Housing Improvement Program funds should not exceed $20,000 for any one dwelling.

7/ 25 CFR 256.2(i) (1991) set out minimum requirements concerning construction, heating system, plumbing system, electrical system, and family size per dwelling.

(4) Undertakings under this category are primarily for applicants who are living in their own homes. * * *

The regulations and appellant's grant agreement provided that the repairs to be done to appellant's house were to bring it up to standard living condition. Presumably the work plans upon which the bid invitations were based described the minimum amount of work necessary to accomplish this. 8/ Contracting for a lesser amount of work would therefore have violated the regulations. 9/ And, from the results of the two bid invitations, it appears that the necessary work could not be accomplished within the $20,000 limit.

BIA was not required to continue issuing bid invitations ad infinitum in an attempt to attract a bid within the $20,000 limit. Appellant does not contend that a bid could have been obtained for that amount. In fact, the affidavit she submits from the late bidder fails to make any representation at all concerning the amount of his rejected bid or the amount he would be willing to bid in the future, were the project to be readvertised.

Under the circumstances present here, the Board concludes that BIA was excused from performance of its contract under generally accepted principles concerning impossibility of performance. See 17A Am. Jur. 2d Contracts § 673 (1991); 17A C.J.S. Contracts § 461 (1963).

[2] The only remaining question is whether the Area Director was precluded from reviewing appellant's eligibility for housing assistance under HIP. Undoubtedly, appellant did not intend to raise the issue of her eligibility when she appealed to the Area Director from the Housing Officer's December 17, 1991, letter. 10/ Having filed an appeal which would require the Area Director to review her file, however, she cannot now complain that he did so. And once the Area Director became aware of

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8/ As indicated in the Housing Officer's Dec. 17, 1991, letter, the work plan was extensively revised, with appellant's consent, before the second bid invitation was let. While this suggests that some of the work described in the first work plan might have been unnecessary, it also suggests that the second work plan represented a true minimum of work required. In any event, appellant makes no allegation here that the second work plan included unnecessary work, i.e., repairs that were not necessary to bring her house to standard living condition.

9/ The preamble to the 1992 revision of the HIP regulations indicates that in the past, "many program administrators were not following the requirements to bring a house to a standard level when doing repairs. This resulted in a large number of homes being technically ineligible for second-time services while still remaining in a substandard condition. This condition is inconsistent with the intent of the program * * *." 57 FR 3102 (Jan. 27, 1992). See also 55 FR 37492 (Sept. 12, 1990) (preamble to proposed revision of HIP regulations).

10/ It appears from the Area Director's decision, however, that the Tribal Chairman may have asked the Area Director to review appellant's eligibility.

the possibility that an error had been made with respect to the initial determination of appellant's eligibility, it was his responsibility to review the matter and correct the earlier decision, if necessary. 11/ See, e.g., Noyo River Indian Community v. Acting Sacramento Area Director, 19 IBIA 63, 67 n. 10 (1990).

The Board has reviewed the information in the record concerning appellant's financial condition. It finds that the Area Director reasonably concluded appellant was not eligible for housing assistance under HIP.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Anadarko Area Director's May 4, 1992, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrataive Judge

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11/ By the time the Area Director issued his decision, the new HIP regulations were in effect. Although there is no indication that he relied on any provision of the new regulations that was not in the former regulations, the Area Director was undoubtedly aware of the Congressional concern which led to revision of the regulations.

The preamble to the final regulations states in part:

"Congressional direction contained in the FY 1984 Department of the Interior and Related Agencies Appropriation Conference Report directed the Bureau to develop a program which is more cost effective and which meets identified housing needs.

"In response to the above directive, the Bureau developed a new system to achieve the results intended. The new system was developed by a team of Bureau and tribal personnel over an extended period of time. * * *

"A new distribution system for HIP funds was developed which is based upon a valid and consistent inventory of housing needs and planned program effort that addresses tribal housing needs on a long-range planned basis. The HIP Selection Criteria [(see note 1)] were developed as a corrective action to address the weakness identified by the Inspector General and the General Accounting Office in the tribal selection process of eligible applicants for HIP assistance." 57 FR at 3102. See also 55 FR at 37492.